



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON

B-33911

The Honorable,

MAY 5

The Secretary of Agriculture.

My dear Mr. Secretary:

I have your letter of April 14, 1943, as follows:

"For the occupancy and use of National Forest land for the construction, operation and maintenance of electric power transmission lines, the Forest Service grants revocable permits and the Department grants easements. Also, acting under the provisions of the Federal Power Act, the Department prescribes certain conditions deemed necessary for the adequate protection and utilization of the National Forests; such conditions are made a part of the license granted by the Federal Power Commission.

"The transmission lines through setting up induction often interfere with the proper functioning of telephone lines or radio installations constructed by the Forest Service from its appropriation or of private facilities utilized by the Forest Service in administering the National Forests or other land under its jurisdiction. Removal of the inductive interference could be accomplished (a) by relocation or alteration of the permitted structure, (b) through relocation of the Government-owned facility, or (c) in some cases by reconstruction or alteration of the Government facility, such as converting a ground circuit telephone line into a metallic circuit line. In many cases the Government facility is in existence before issuance of permit covering the permitted structure, but occasionally a Government telephone line or other facility is constructed subsequent to issuance of permit and/or construction thereunder. The cost of relocation or reconstruction of the Government structure may be many times the annual revenue from the permitted structure; for example, the charge for a permit authorizing the occupancy and use of national forest land for a transmission line may be \$15.00 a year and the relocation or reconstruction of the Government facility with which it interferes may cost \$300. For some permits, such as those to cooperative organizations of farmers for transmission lines, no charge is made, although construction of the permitted line may necessitate a substantial expenditure either by the Government or by the permittee to correct interference with the Government facility caused by the transmission line. In all cases of license, a rental charge is made.

"Prior to a few months ago, it was our practice to insert the following clause in our permits and an almost identical clause in the easements. Also the Federal Power Commission, at our request, included a very similar clause in its licenses for primary transmission lines:

"(G) The permittee shall, before placing any transmission line into operation, make provision satisfactory to the Regional Forester for avoiding inductive interference between such transmission line and any existing radio installation, telephone line or lines used by the Forest Service in administering the national forests and land under its jurisdiction, or with any such radio installation, telephone line or lines for which location has been made and specifications prepared but upon which construction has not begun at the time of erection of said transmission line. Such provisions may be applied either to the transmission line, or to the radio installation or telephone line or to both, as may be determined upon the basis of least cost. The permittee hereby agrees to assent to such changes in the location or design of any of its transmission lines as may in the opinion of the Regional Forester be necessary or desirable in order to avoid inductive interference with any radio installation or telephone line or lines hereafter constructed or proposed to be constructed, and to be used by the Forest Service in administering the national forests and land under its jurisdiction provided such changes are made at the expense of the United States or the owner of the radio installation or telephone line."

"The purpose of the clause is of course to prevent interference with Forest Service use of telephone lines and radio. If the telephone line or radio installation was constructed prior to the construction of the transmission line, the permittee, grantee or licensee is required to pay the cost of avoiding or removing inductive interference. However, if at the time of granting the transmission line permit, easement or license, the Forest Service estimated no future need for a telephone line or radio installation close to the transmission line, the cost of avoiding interference is borne by the owner of the telephone line or radio installation used by the Forest Service and necessary in its administration. This seemed a reasonable and justifiable method of financing.

"The attention of the Acting Chief of the Forest Service was directed to the portion of the clause relative to financing necessary changes when the telephone line or radio installation was constructed subsequent to the transmission line under permit. Reference was made to various decisions of the Comptroller General which held in effect that Federal appropriations could not be expended for the removal or relocation of structures covered by a permit granted by a Federal agency where such structures interfere subsequently with the public use (18 Comp. Gen. 806; A-36464, July 22, 1931; A-38299, September 8,

1931; A-48559, May 9, 1933). It was suggested that because of these decisions public funds, specifically the appropriation for national forest protection and management in the Forest Service section of the Department Appropriation Act, could not be expended for the relocation or reconstruction of a Government-owned improvement to correct interference caused by structures under permit. Such reasoning appeared sound since the result of relocating the Government-owned structure would usually be the same as relocating the permitted structure, which latter it is held may not be paid by the Government. Accordingly the standard clause in the permit was changed to require that the cost of removing interference would be borne by the permittee regardless of whether the transmission line was constructed subsequent to or before the telephone line and radio installation. No change, however, was made in the standard clause for the easement and license because the right given by the Government practically amounts to title during the life of the easement or license.

"This change in the permit clause brought objection on the ground that it is unfair and inequitable after the permittee has constructed its lines to require it to pay the cost of changes necessary to avoid interference with telephone lines or radio not contemplated at the time the transmission lines were built. Further that the revised requirement goes beyond that in the Federal Power Commission license which provides that the cost of removing the interference shall be borne by the owner of the new line. In other words, question has been raised whether the Forest Service has correctly applied to Government-owned facilities the Comptroller General's decisions relative to structures under permit.

"Another question has also been raised. If it appears to be for the best interests of the Government as a whole can the Forest Service appropriation bear the cost of changing the design or location of Government-owned facilities in order to remove or prevent interference caused by permitted private lines - such as those of cooperatives financed from Rural Electrification Administration loans. The answer would appear in the negative if the Comptroller General's decisions above noted are applicable. If not, it is believed that no applicable decision has as yet been made.

"Your decision is desired whether the appropriation for national forest protection and management may be charged with the cost of relocating, reconstructing, or otherwise altering Forest Service facilities to correct interference caused by transmission lines erected and maintained on national forest land under permit issued by the Forest Service (a) when the Government facilities are in existence prior to the erection of the permitted structures and (b) when the erection of the Government structures is subsequent to the granting of permit and/or construction thereunder. It is desired

that the decision state whether it applies also to (1) easements granted by this Department and licenses issued by the Federal Power Commission and (2) cases where permit or easement is issued without occupancy charge, as well as where such charge is made for permit or easement.

"It held that the appropriation may not be expended for relocation or alteration of a Government facility, to correct interference caused by the permitted line, further decision is desired as to whether the holding applies to all cases or whether the appropriation may be so expended when in the judgment of the Department it will best serve the public interests as a whole."

The principal question for determination here would appear to be whether the fact that it is proposed to expend appropriated moneys to relocate, reconstruct, or otherwise alter Government facilities rather than the power transmission lines of a licensee, permittee, or holder of an easement—where the coexistence thereof at present locations on public lands impairs the Government's use of its own facilities—removes the instant case from the purview of past decisions of this office to the effect that the use of appropriated funds to relocate transmission lines under such circumstances requires specific statutory authority. There can be no doubt but that the purpose to be accomplished—that is, the elimination of the interference—is the same in either case. And it would seem too obvious to require supporting argument that the principles of such past decisions have application to the expense of accomplishing this result without regard to the means by which it is accomplished.

Where there is in existence and operation, at the time an application of a private citizen or organization for the right to construct transmission lines across public lands is received,

facilities by which the official business of the Government is being carried on, it would seem that a failure to include in any such grant—be it easement, license or permit—an express condition safeguarding the interests of the United States with respect to such existing facilities might well be deemed unwise—if not unsound—administration. At any rate, the provision quoted in your letter—which apparently has been included not only in all permits issued by the Forest Service both before and after the so-called revision but in easements granted by the Department as well as licenses granted by the Federal Power Commission—would seem to cover such a situation in clear and unambiguous terms. In view of such provision, there is not understood the basis upon which it possibly could be reasoned that in such cases the correction of any interference caused by the construction of the transmission lines should involve the expenditure of appropriated funds.

The factual situation is somewhat different where the telephone lines or radio facilities with which the transmission lines interfere were not contemplated at the time the grant was executed but were erected by the Government at a later date. However, if the grant be in the form of a permit—revocable either impliedly by its nature or expressly by its terms—the right of the Government to put a complete end to the privilege accorded by the permit would seem clearly to comprehend the lesser right to require the permittee to take whatever steps might be necessary to eliminate any interference with Government facilities. And, in view of such right,

the lack of authority to spend public funds for the purpose seems no less apparent than in the first instance.

Moreover, the equities of the matter—while of no material bearing on the present problem—seem preponderantly in favor of the United States. The land involved is, after all, Government property upon which the permittee would have had no right to construct its lines but for a specific grant. And the small amount of the annual revenue, if any, received by the Government from such grants is a strong indication that the grant is for the primary benefit of the grantee. Under such circumstances it seems far from "unfair and unquitable" to require the grantee to bear the expense of eliminating interference with the Government's use of its own property, regardless of the fact that such use may not have been contemplated at the time the permit was issued.

Moreover, this office previously has held, in a decision dated ²⁰⁰⁰⁻⁰¹⁻¹⁹ January 18, 1941 (B-13533), that:

"* * * even if the grant be considered on the basis of an easement, the Federal Government must be understood to have reserved to itself at the time the grant was made the right to require uncompensated obedience to such reasonable orders as were issued by competent authority for the purpose of regulating the use of the easement in the interest of the public welfare or convenience * * *.

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"* * * Thus it must have been contemplated when the easement or other right here in question was granted to the Bell Telephone Company that new highways would, from time to time, be constructed across the public domain and that old ones would be improved and altered. The company must be presumed to have taken and occupied the rights-of-way with this in mind, and subject to the paramount right of the State and the Federal Government to require adjustment of its poles and lines if a public need for such adjustment should arise. * * *" (Underlining supplied.)

The matter of licenses issued by the Federal Power Commission pursuant to authority conferred by section 4 of the Federal Power Act (16 U. S. C. 797) ^{June 10, 1920, 41 Stat. 1065} was considered by this office in a decision dated December 1, 1932 (A-44362). It had become necessary in the construction of an Alaskan highway project to relocate certain power line poles previously erected under a "license or permit" issued by the Federal Power Commission. It was the administrative view that by virtue of certain provisions in the Federal Power Act relating to such licenses—including a requirement for the payment of an annual fee—the licensee had acquired vested rights which the United States could not invade, and which rendered inapplicable the rule of the earlier decisions of July 22, 1931 (A-36464) and of September 8, 1931 (A-38299). However, it was held that such decisions were controlling and that appropriated funds were not available for such expenses in the absence of statutory authority. With respect to the payment of an annual fee, it was said:

"The authority for licensing the limited use and occupation of the public lands is for the primary benefit of the licensee and the provision for a nominal annual charge for the purpose of reimbursing the United States for the costs of administration of the licensing act and for the use, occupancy and enjoyment of its lands (section 10, act June 10, 1920, 41 Stat. 1068, U.S.C. 16:803(e), Federal Power Commission Regulation No. 14, section 2) does not even suggest a purpose that the licensing agreements will devolve expenditures on the United States of the character your application for decision suggests."

Hence, it may be concluded that since there is no specific provision in the law for expenses of the nature here involved to be borne by the Government, there is no authority to charge funds

appropriated for the protection and management of national forests therewith—regardless of whether the Government facilities were erected prior or subsequent to the grant or whether the grant be in the form of an easement, license, or permit and even though the terms of the grant require the payment of an annual fee or charge for the right or privilege conferred therein.

Moreover, unless and until there shall have been delegated to the Department of Agriculture by the Congress specific authority to determine that under the facts of a given situation the public interests as a whole would be best served by the use of appropriated moneys to correct any such interference, such matters would appear properly for legislative rather than administrative consideration.

Your submission is answered accordingly.

Respectfully,

Comptroller General
of the United States.